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## Supreme Court of the United States

OCTOBER TERM, 1941.

No. **187**

A. L. McCORMACK, PETITIONER,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR  
THE EIGHTH CIRCUIT.**

FOREST W. HANNA,

Fidelity Building,

Kansas City, Missouri,

Counsel for Petitioner.

## INDEX

Petition for Writ of Certiorari.....	1
A. Summary statement of the matter involved.....	1
B. Statement of the jurisdiction of this court.....	5
(1) Statutory provision believed to sustain the jurisdiction.....	5
(2) The date of the judgment to be reviewed.....	5
(3) Statement of the nature of the case and the rulings of the circuit court of appeals bringing the case within the jurisdiction of this court.....	5
(4) Cases believed to sustain the jurisdiction of this court.....	6
C. The questions presented and reasons for allowance of the writ.....	6
(1) Did the conduct of petitioner constitute misbehavior, on his part in the presence of the court or so near thereto as to obstruct the administration of justice.....	6
(2) Was this prosecution barred by laches and the statutes of limitations in view of the admitted fact that any and all acts of alleged contempt occurred more than three years next before the filing of the information.....	7
(3) Was the purported statutory court vested with jurisdiction to entertain this independent criminal prosecution at law for alleged contempt or to impose therein a punitive sentence.....	7
Conclusion.....	8

## AUTHORITIES

(See Conclusion, page 8)

Appeal of Marks, Pa. Sup. Ct. Rep. 556	7
Beattie vs. People, 33 Ill. App. 651	7
Boyd vs. Glucklich, 116 Fed. 131	7
Ex parte Poulson, 19 Fed. Cases 1205, Case No. 11350	7
Ex parte Robinson, 86 U. S. 505, 22 L. Ed. 205	7
Ex parte Schulenburg, 25 Fed. 211	7
Gompers vs. United States, 233 U. S. 604	7
Goodall vs. Superior Court, 37 Cal. App. 723	7
Gorden vs. Commonwealth, 141 Ky. 461	7
Millinocket Theatre vs. Kurson, 39 Fed. Supp. 979	7
Morgan vs. United States, 95 F. 2d (8th Circuit) 830	7
Nye vs. United States, 313 U. S. 33, 85 L. Ed. 1172	7
Phillips vs. United States, 312 U. S. 246	8
Russell vs. United States, 86 F. 2d 389, l. c. 392	8
Thomas J. Pendergast vs. United States, 314 U. S. 574	8
United States vs. Goldman, 277 U. S. 229	7
Warring vs. Colpoys, 122 F. 2d (C. A. D. C.) 642	7
Wimberly vs. United States, 119 F. 2d (5th Circuit) 713	7

## STATUTES

Section 240 (a), Judicial Code, as amended by the Act of February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 938 (28 U. S. C. A. 347 (a)), and under same Act, Ch. 229, Sec. 8, 24 Stat. 940 (28 U. S. C. A. 350)	5
Section 268 of the Judicial Code (28 U. S. C. A., Sec. 385)	5

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## **PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.**

May It Please The Court:

The Petitioner A. L. McCormack respectfully shows  
this Honorable Court:

A.

### **SUMMARY STATEMENT OF THE MATTER INVOLVED.**

On July 13, 1940, Your Petitioner, A. L. McCormack, was jointly charged with T. J. Pendergast and R. E. O'Malley with contempt of the purported statutory court constituted of Judge Kimbrough Stone, Presiding Judge of the United States Circuit Court of Appeals for the Eighth Circuit, and Judges Albert L. Reeves and Merrill E. Otis of the District Court for the Western District

of Missouri, by information, and entitled cause No. 5040 (R. 1).

After plea of not guilty and other several preliminary motions, the cause came on for trial on April 14, 1941, and at said trial your petitioner testified (R. 694-733), and said testimony was the only testimony at said trial supporting the alleged contemptuous acts charged in the information.

It appears by stipulation that on December 31, 1929, certain insurance companies promulgated rate increases in Missouri (R. 363), and thereafter filed bills in equity in the United States Circuit Court for the Central Division of the Western District of Missouri seeking injunctive relief against official interference with said increase by the Missouri Superintendent of Insurance (R. 363-364-435). Thereafter on July 2, 1930, an interlocutory injunction was entered restricting the said Superintendent from interfering with the said increase in rates (R. 503), upon the condition that the entire amount of said increase should be impounded with a custodian appointed by the Court (R. 505, 506, 507). Thereafter on June 19, 1935, there was filed a stipulation of settlement between the Superintendent of Insurance and the Companies (R. 607). And on February 1, 1936, the Court entered its decree dismissing the causes and directing the distribution of the impounded funds pursuant to said stipulation and agreement (R. 617), which, in effect, allowed the companies four-fifths of said rate increase and impounded funds in conformity therewith and allowed the Insurance Superintendent, for the benefit of the policyholders, the remaining one-fourth of said funds.

The testimony of your petitioner in brief substance was that: In the early part of 1935, at the instance of co-defendant O'Malley, then Superintendent of Insurance (R. 694-697), your petitioner arranged a meeting between one Street, Agent for the Companies (R. 700) in Chicago (R. 702-703-704), and co-defendant Pendergast, whereby the said Street offered to pay Pendergast a fee

of \$500,000 for a settlement of the litigation between the companies and O'Malley, as Superintendent of Insurance (R. 704), to which Pendergast replied that he would see what he could do about it (R. 705).

Thereafter your petitioner received from Street and delivered to Pendergast, a total of \$440,000 (R. 782-783-706-707-711-784-716 and 717); that of this sum Pendergast gave a total of \$125,000 back to your petitioner who divided said sum equally, retaining one-half for himself and delivered the other one-half to O'Malley (R. 709-710-713-714).

Your petitioner further testified that on May 18, 1935, an agreement was entered into at the Muehlebach Hotel, Kansas City, Missouri, between the Companies and O'Malley (R. 724-725) upon which the stipulation above referred to was made.

Your petitioner further testified that in February and March, 1939, he appeared before a Grand Jury three or four times, and eventually testified in substance to the same facts as above detailed (R. 717-718-719); and further testified that there was no agreement between himself, O'Malley or Pendergast to keep the transaction in question secret (R. 728).

The Grand Jury, before which your petitioner appeared, thereafter indicted co-defendants O'Malley and Pendergast for income tax evasion, but did not indict your petitioner (R. 841-858-859).

On May 29, 1939, the three-judge statutory court, on motion of the successor Superintendent of Insurance, entered an order of restitution in the rate cases directing that all funds paid out to the insurance companies be restored to the custodian (R. 756); and thereafter, on August 14, 1940, entered its decree directing the distribution among the policyholders of said funds so returned (R. 628).

Upon these facts the trial court filed its opinion on May 28, 1941 (R. 50), and judgment and sentence were pronounced on June 7, 1941 (R. 65).



Up to the time of final judgment in the trial court this proceeding was entitled Cause No. 5040 on the Criminal Court Docket of the Central Division of the Western District of Missouri (R. 1), and as a part of said final judgment the trial court directed the clerk thereof to re-style all pleadings and orders theretofore filed by adding to the designation the descriptive term "A proceeding in Contempt incidental to equity cases Nos. 270 to 426, inclusive" (R. 66-1184). On said judgment your petitioner was found guilty and sentenced to probation for a period of two years.

Thereafter your petitioner perfected his appeal to the United States Court of Appeals for the Eighth Circuit, by filing his notice of appeal and grounds therefor, his assignment of errors and paying his filing fee with the Clerk of said Court and prayed that said appellate court would consider the bill of exceptions, the printed record and the briefs of the co-defendants and appellants O'Malley and Pendergast, as his own, for the reason that he was without funds to properly pay for the same or to contribute thereto, and that in the interest of equal justice between all of the defendants in the same case that his appeal might be considered. The said Court of Appeals considered the appeal of your petitioner (R. 1188 et seq.).

Upon appeal, in the court below, petitioner contended:

- (1) That the acts proved did not constitute misbehavior in the presence of the Court, or so near thereto, as to obstruct the administration of justice;
- (2) That prosecution was barred by laches and the statute of limitations;
- (3) That the court below was without jurisdiction.

These contentions were rejected (R. 1188 et seq.). This petition is filed within 30 days next after final judgment on June 1, 1942.

B.

## **STATEMENT OF THE JURISDICTION OF THIS COURT.**

(1)

### **Statutory Provision Believed to Sustain the Jurisdiction.**

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 938 (28 U. S. C. A. 347 (a)), and under the same Act, Ch. 229, Sec. 8, 24 Stat. 940 (28 U. S. C. A. 350).

(2)

### **The Date of the Judgment to Be Reviewed.**

The judgment of the Circuit Court of Appeals for the Eighth Circuit affirming the conviction of petitioner was entered on June 1, 1942 (R. 1213-1214). The issuance of the mandate has been stayed pending this application (R. 1218). This petition, without supporting brief, and the certified record are filed within thirty days next after final judgment.

(3)

### **Statement of the Nature of the Case and the Rulings of the Circuit Court of Appeals Bringing the Case Within the Jurisdiction of This Court.**

The Circuit Court of Appeals ruled: (a) that, although no act of petitioner occurred in the presence of the court or in any geographical proximity thereto, he was nevertheless guilty of misbehavior in the presence of the court, within the meaning of Section 268 of the Judicial Code (28 U. S. C. A., Sec. 385), and hence was



punishable upon information for contempt (R. 1197); (b) that this prosecution is not barred by the fact that all allegedly contemptuous acts occurred more than three years next before the filing of the information, upon the ground that no statute of limitations is applicable to a prosecution for contempt for misbehavior in the presence of the court (R. 1197); (c) that the trial court was vested with jurisdiction (R. 1205). Each of such rulings is reviewable by this court under the appropriate statutory provisions noted.

(4)

#### **Cases Believed to Sustain the Jurisdiction of This Court.**

The cases submitted by petitioner as the basis for the exercise of such jurisdiction, to review the judgment below, are included in briefs of the co-defendants O'Malley and Pendergast as attached to their respective petitions for a writ of certiorari.

C.

#### **THE QUESTIONS PRESENTED AND REASONS FOR ALLOWANCE OF THE WRIT.**

(1)

**Did the Conduct of Petitioner Constitute Misbehavior on His Part in the Presence of the Court or So Near Thereto As to Obstruct the Administration of Justice?**

The Circuit Court of Appeals (Riddick, J., dissenting) in ruling (R. 1197) that the conduct of petitioner did constitute such misbehavior, even when petitioner was at no time in the presence of the court or in geographical proximity thereto and did not disrupt order or decorum or actually interrupt the court in the conduct

of its business, has decided a federal question in a way probably in conflict with applicable decisions of this Court, viz.: *Ex parte Robinson*, 86 U. S. 505, 22 L. Ed. 205; *Nye v. United States*, 313 U. S. 33, 85 L. Ed. 1172; and has rendered a decision in conflict with decisions of other Circuit Courts of Appeals on the same matter, viz.: *Wimberly v. United States*, 119 F. 2d (5th Circuit) 713; *Warring v. Colpoys*, 122 F. 2d (C. A. D. C.) 642. See further: *Dissenting opinion below of Riddick, J.* (R. 1206); *Morgan v. United States*, 95 F. 2d (8th Circuit) 830; *Ex parte Poulson*, 19 Fed. Cases 1205, Case No. 11350; *Ex parte Schulenburg*, 25 Fed. 211; *Boyd v. Glucklich*, 116 Fed. 131; *Millinocket Theatre v. Kurson*, 39 Fed. Supp. 979.

## (2)

**Was This Prosecution Barred by Laches and the Statutes of Limitations in View of the Admitted Fact That Any and All Acts of Alleged Contempt Occurred More Than Three Years Next Before the Filing of the Information?**

The Circuit Court of Appeals in ruling that this prosecution was not so barred because the acts were continuing in their effect and that the statute of limitations was inapplicable has decided a federal question in a way probably in conflict with applicable decisions of this court, viz.: *Gompers v. United States*, 233 U. S. 604; *United States v. Goldman*, 277 U. S. 229, or if not so in conflict, then your petitioner contends the Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this court. The ruling below is directly in conflict with the doctrine of the *Gompers Case* as heretofore judicially construed (*Appeal of Marks*, Pa. Sup. Ct. Rep. 556), and with the weight of authority, viz.: *Beattie v. People*, 33 Ill. App. 651; *Goodall v. Superior Court*, 37 Cal. App. 723; *Gorden v. Commonwealth*, 141 Ky. 461.

**Was the Purported Statutory Court Vested with Jurisdiction to Entertain This Independent Criminal Prosecution at Law for Alleged Contempt or to Impose Therein a Punitive Sentence?**

In ruling that the statutory court had jurisdiction to entertain this independent criminal prosecution at law, and in ruling that in any event the conviction of petitioner was valid because one of the members of such court was the district judge for the Central Division of the Western District of Missouri and issued the original restraining order, although under the rules of the district court for the Western District of Missouri no member of the statutory court was, at the time of the institution of this prosecution, judge of the Central Division of the Western District of Missouri, the Circuit Court has decided a federal question (i. e., the jurisdiction of a statutory court to entertain a criminal proceeding at law for contempt) in a way probably in conflict with applicable decisions of this court, viz.: *Thomas J. Pendergast v. United States*, 314 U. S. 574; *Phillips v. United States*, 312 U. S. 246; *Russell v. United States*, 86 F. 2d 389, 1. c. 392; declaring the rule that a criminal proceeding for contempt is an action at law, a separate and independent proceeding and neither a part of nor incidental to the cause out of which the contempt arose.

**CONCLUSION.**

Your petitioner shows the court that he is without sufficient funds to pay or contribute to the expense of preparing the record in this case but that said record has been prepared by co-defendants and has been filed within thirty days since the judgment of the court below; that he is likewise without sufficient funds to employ counsel for the proper preparation of a brief to be attached to this petition but that briefs have been fully prepared by most able counsel in support of the petitions of co-de-

pendants heretofore filed in this court within thirty days since judgment of the court below; that the grounds submitted by this petitioner are identical with the grounds submitted by co-defendants in their respective petitions to this court with the exception that the third ground and reason why this court should entertain petition for certiorari as set out in each of the respective petitions of co-defendants is not included as a ground and reason in the petition of this petitioner. Your petitioner further shows the court that his petition is filed in order that complete justice may be done to all of the parties interested rather than justice be done to only a part of those interested.

Wherefore, your petitioner prays that his petition be herein accepted; that the record heretofore filed be considered also as his record; that the briefs submitted and attached to petitions of co-defendants Pendergast and O'Malley be considered as his brief and argument (except brief and argument on question three as set out in the petition and briefs of co-defendants, as to whether or not they were entitled to a discharge or a stay of execution for executive clemency because of an agreement that said defendants would receive an immunity from all further charges, including contempt, in return for a plea of guilty of the said co-defendants to the charge of income tax evasion); that a writ of certiorari issue under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and proceedings in the United States Circuit Court of Appeals in the case numbered and entitled on its docket Nos. 12087 and 12118, criminal, A. L. McCormack, appellant v. United States of America, appellee, and that this cause may be reviewed and determined by this court as provided by the statutes of the United States; and that the judgment of said Circuit Court of Appeals be reversed by this court; and your petitioner prays that a certified copy of

the record and proceedings of said United States Circuit Court of Appeals for the Eighth Circuit, heretofore filed, may be treated as a return to said writ of certiorari, and your petitioner prays that he may have such other and further remedies in the premises as to the court may seem appropriate and in conformity with law.

Respectfully submitted,

A. L. McCormack,  
Petitioner,

FOREST W. HANNA,  
Fidelity Building,  
Kansas City, Missouri,

JAMES E. CARROLL,  
Boatmen's Bank Building,  
St. Louis, Missouri,

Counsel for Petitioner.